SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1107

GREENHOUSE BROS. & FINKELSTEIN, INC., A NEW YORK CORPORATION,

Petitioner,

vs.

RECONSTRUCTION FINANCE CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS.

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Counsel for Petitioner.

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vs.

RECONSTRUCTION FINANCE CORPORATION,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Greenhouse Bros. & Finkelstein, Inc., prays that a writ of certiorari issue to review the judgment of the United States Emergency Court of Appeals in the above case.

Opinion Below

The opinion of the Court below, which was filed February 5, 1947, is not yet reported. It appears at R. — (Transcript of the record, pages 12-18).

Basis of Jurisdiction

The judgment of the court below was entered February 5, 1947. The jurisdiction of this Court is invoked under Section 204 (e) of the Emergency Price Control Act of 1942, 56 Stat. 31, and under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938.

Summary Statement

This case arises out of a determination by the respondent that, under the provisions of Amendment No. 2 (9 F. R. 1820) to Regulation No. 3 (8 F. R. 10826) isued by Defense Supplies Corporation, petitioner was ineligible for the special subsidy of 80 cents per cwt. established for non-processing slaughterers of cattle by the amendment.[1]

Amendment No. 2 was issued October 30, 1943, pursuant to a Directive of the Economic Stabilization Director on October 25, 1943 (8 F. R. 14641). It established the special subsidy and set forth certain conditions of eligibility. The conditions were these:[2]

> "Sec. 7003.14 *Extra compensation for non-processing Slaughterers of beef*—(a) Definitions. (1) 'Non-processing slaughterer of beef' means an unaffiliated slaughterer as hereinafter defined who during six consecutive months of 1942, sold, and who currently sells,
>
> "98% or more, measured in dressed carcass weight, of the total beef produced from cattle slaughtered by

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[1] Defense Supplies Corporation, a wholly owned subsidiary of Reconstruction Finance Corporation (6 F. R. 2972), was dissolved, and its functions transferred to Reconstruction Finance Corporation, by Public Law 109, 79th Cong., 1st Sess., approved June 30, 1945 (59 Stat. 310).

[2] Regulation No. 3, Revised, of the Defense Supplies Corporation, which was issued and effective on January 19, 1945, contains the same definitions (10 F. R. 4241).

him in all his establishments, in the form of carcasses, wholesale cuts, boneless beef or ground beef.

"(2) 'Unaffiliated slaughterer' means a slaughterer who does not own or control a processor or purveyor of meat, and who is now owned or controlled by a processor or purveyor of meat. 'Unaffiliated slaughterer' shall not include any institution, representative or agency of Federal, State or local governments.

"(3) 'Processor or purveyor of meat' means a person who processes fresh beef or sells or dispenses fresh or processed meat or products containing meat, at wholesale or at retail, or in a hotel, restaurant or other eating establishment.

"(4) 'Own or control' means to own or control directly or indirectly a partnership equity or in excess of ten percent of any class of outstanding stock or to have made loans or advances in excess of five percent of the other person's monthly sales."

Petitioner, a New York corporation, was incorporated in March, 1940, and is located in East Syracuse, New York (T. p. 6). It is engaged in business as a meat slaughterer and prepares and sells wholesale cuts of beef (T. p. 6).

Petitioner claimed and was paid the special subsidy for several months following the effective date of the amendment, November 1, 1943 (T. pp. 3, 14). On August 1, 1944, however, Defense Supplies Corporation refused further payments of the subsidy to petitioner, taking the position that petitioner was not an unaffiliated slaughterer within the meaning of the amendment (T. pp. 3-4, 14). Petitioner was directed to repay the payments theretofore received by it (T. pp. 3, 14). The Price Administrator subsequently relieved petitioner of this obligation pursuant to the authority of Section 2 of Public Law 88, approved June 23, 1945, 59 Stat. 261 (T. p. 14). This relief was authorized in

cases where a slaughterer had received special subsidy payments in good faith and in the reasonable belief that he was eligible and where it would have been inequitable to require repayment from him (T. pp. 3, 14).

Under date of August 22, 1946, petitioner filed a protest with respondent's Board of Directors challenging the validity of Defense Supplies Corporation's determination that petitioner was an affiliated slaughterer and ineligible for the subsidy (T. p. 3-6, 14). The protest stated that petitioner was not "in truth and in law" an affiliated slaughterer under the amendment and regulation (T. pp. 5), and asked the Board to review the administrative interpretation to the contrary and to declare petitioner eligible for the subsidy (T. p. 6).

The Board denied petitioner's protest by letter dated September 17, 1946 (T. pp. 1-3). The denial was made without a hearing, without the Board's requesting evidence, and without further proceedings of any sort (T. p. 15). The determination of the Board was as follows (T. pp. 2-3):

> "I. That said Regulation is in all respects valid;
>
> II. That Renee Packing Co., Inc., is a processor or purveyor of meat;
>
> III. That Greenhouse Bros. & Finkelstein, Inc. and Renee Packing Co., Inc. were at all times here involved affiliated;
>
> IV. That Greenhouse Bros. & Finkelstein, Inc. is owned and controlled by the following officers and stockholders:
>
> Officers:
>
> President.....Paul Greenhouse
> Vice President.....Nathan Finkelstein
> Sec. & Treas.....William Greenhouse

Stockholders:

Total Shares Issued	614	
William Greenhouse	144	shares
Paul Greenhouse	129½	shares
Nathan Finkelstein	134½	shares
Rose Greenhouse	60	shares
Estabel Greenhouse	74	shares
Fannie Finkelstein	70	shares
Eli Gingold (atty)	1	share
Jessie Hecker	1	share
Total	614	

V. That Renee Packing Co., Inc. is owned and controlled by the following officers and stockholders:

Officers:

President	Eli Gingold
1st Vice Pres.	William Greenhouse
2nd Vice Pres.	Nathan Finkelstein
Sec. & Treas.	Paul Greenhouse

Stockholders:

Total Shares Issued	695
William Greenhouse	231⅔
Paul Greenhouse	231⅔
Nathan Finkelstein	231⅔
Total	695

VI. That such common ownership and control constitute affiliation within the terms of said Regulation, disqualifying Greenhouse Bros. & Finkelstein, Inc., from eligibility to receive the extra compensation of eight-tenths of one cent per pound."

A complaint against this determination was filed in the court below on October 18, 1946 (T. p. 6). After argument on January 14, 1947, the court below filed its opinion and

ordered the complaint dismissed on February 5, 1947 (T. pp. 12-18). A judgment to that effect was entered the same day (T. p. 18).

The Board's findings numbered IV and V (T. p. 2), which identify the officers and stockholders of the Renee Packing Co., Inc., and of petitioner, are correct. It is to be noted that neither corporation owns stock in the other.

The Board's determination, which was approved by the court below, rested upon the sole ground that Wm. Greenhouse, Paul Greenhouse, and Nathan Finkelstein own all of the stock and are officers of the Renee Packing Co., Inc., and also own approximately two-thirds of the stock and are officers of petitioner (T. p. 2). From this fact, it was concluded that petitioner owned and controlled the Renee Packing Co., Inc., or was owned and controlled by the latter and that therefore the two were affiliated within the meaning of the amendment (T. pp. 2-3). No evidence was heard concerning the actual relationships between the two corporations. No finding that one of the two actually owned or controlled the other, or that the two were in fact affiliated, was made. This was despite the authority of the Board under Sec. 203 (a) of the Emergency Price Control Act of 1942[3] to hold a hearing or provide an opportunity for the presentation of further evidence.

Except for the alleged affiliation found by respondent, petitioner is eligible for the special subsidy in all respects.

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[3] January 30, 1942, c. 26, Title II, Sec. 203, 56 Stat. 31, as amended June 30, 1944, c. 325, Title I, Sec. 106, 58 Stat. 638. Subsection (a) in part provides: "Within a reasonable time after the filing of any protest under this subsection, . . . the administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith".

This subsection applies to the instant matters. *Illinois Packing Co.* v. *Bowles*, Em. App. 1945, 147 F. 2d 554.

Questions Presented

1. Does a corporate slaughterer own, or is it owned by, a corporate processor, within the meaning of Amendment No. 2, because of the single fact that the three individuals who own all the stock and are officers of the processor also own approximately two-thirds of the stock and are officers of the slaughterer?

2. Does a corporate slaughterer control, or is it controlled by, a corporate processor, within the meaning of Amendment No. 2, because of the single fact that the three individuals who own all the stock and are officers of the processor also own approximately two-thirds of the stock and are officers of the slaughterer?

3. In the absence of a statutory mandate, may an administrative body such as respondent draw a conclusive presumption, which can not be rebutted, that a corporate slaughterer owns or controls, or is owned or controlled by, a corporate processor from the single fact that the three individuals who own all the stock and are officers of the processor also own approximately two-thirds of the stock and are officers of the slaughterer?

4. In the absence of any finding of fact that the corporate entity is being used as a subterfuge to defeat public convenience, justify wrong, or perpetrate a fraud, and without statutory mandate, may an administrative body, such as respondent, disregard the corporate entity and make the corporation the owner or controller of its stockholder's property?

5. If respondent's interpretation and application of the definitions of Amendment No. 2, which deprive petitioner of the benefits of the special subsidy, are correct, are the definitions as so interpreted and applied in this case un-

constitutional in that they are arbitrary, capricious and unreasonable and in that they deprive petitioner of its property without due process of law in violation of the Fifth Amendment of the Constitution of the United States of America?

Reasons Relied upon for the Allowance of the Writ

1. This case presents an important question of Federal, administrative law which has not been, but should be, settled by this Court.

The corporation is a vital element in our national economy. The administrative body has become an increasingly important element in our governmental system, and its regulations have reached far out into the conduct of business affairs. Inevitably, the corporation and the administrative body have come into conflict. Out of that conflict, these transcendent questions have again and again arisen: What are the points beyond which administrative bodies can not go in directing and determining the legal consequences of corporate activities; what limits are upon the administrative power to abrogate rights fixed by settled law and hitherto only changeable by proper legislative action?

So long as these questions remain without clear answers, there is the type of uncertainty and dissatisfaction which is not only harmful to business but also to the efficient administration of government. This case contains an important opportunity for this Court to lay down a clear rule for the guidance of both business and government in one aspect of their inter-relations. Here we have an administrative body disregarding the corporate entities involved and ruling that one corporation owns and controls another because of the single fact that some of the stockholders and officers of one are stockholders and officers of the other. And this in applying a regulation that does not

in terms lay down such a measurement of ownership and control.

Counsel is unable to discover that this Court has passed directly upon the questions here presented. Its importance in every day administrative law is illustrated by *Ziffin, Inc.*, v. *United States*, 318 U. S. 73, 63 S. Ct. 465, where the decision of this Court was upon grounds that made it unnecessary to pass upon an essentially similar question.

2. The decision below is in conflict with the applicable decisions of this Court.

Since the court below disregarded the corporate entities of the petitioner and the Renee Packing Co., Inc., without a finding of exceptional circumstances or that one in fact owned or controlled the other, its decision is in conflict with the rule that a corporation is an entity separate and distinct from its stockholders long settled by the decisions of this Court.

Chicago, M. & St. P. Ry. et al. v. *Minneapolis Civic and Commerce Ass'n.*, 247 U. S. 490, 38 S. Ct. 553;

Corsicana National Bank v. *Johnson*, 251 U. S. 68, 40 S. Ct. 82;

Cannon Mfg. Co. v. *Cudahy Packing Co.*, 267 U. S. 333, 45 S. Ct. 250;

New Colonial Ice Co. v. *Helvering*, 292 U. S. 435, 54 S. Ct. 788;

United States v. *Elgin, J. & E. Ry. Co.*, 298 U. S. 492, 56 S. Ct. 841;

Schenley Distillers Corporation v. *United States*, 66 S. Ct. 247;

Boutell v. *Walling*, 66 S. Ct. 631.

In the *Elgin* case, at page 498, this Court said:

> "Mere ownership by the United States Steel Corporation of all the shares of both appellee and producing subsidiary was not enough to show that products made or owned by the latter were articles or commodities produced by the former, or under its authority, or which it owned in whole or in part, or in which it had an interest, direct or indirect, and was forbidden to transport by the commodities clause."

Again in the *Elgin* case, at page 501, it was said by this Court:

> "Considering former rulings, it is impossible for us now to declare as a matter of law that every company all of whose shares are owned by a holding company necessarily becomes an agent, instrumentality, or department of the latter. Whether such intimate relation exists is a question of fact to be determined upon evidence."

In its opinion, the court below said (T. p. 18):

> "Another way of putting it, quite consistent with the language of the subsidy regulation, is to say that Renee Packing Co., Inc., a processor of meat, through its officers and sole stockholders, . . . 'indirectly' controls over fifty per cent of the outstanding stock of complainant."

The court below found indirect control arising solely out of the identity of the stockholders and officers of the petitioner and the Renee Packing Co. No evidence to determine the fact of the relationship between the two corporations was ever taken. No finding of exceptional circumstances warranting the piercing of the corporate veils was ever made. *Boutell* v. *Walling, supra.* It is submitted,

therefore, that the decision below is in conflict with the decisions of this Court.

3. The decision of the court below is in conflict with another of its own decisions.

On the same day it handed down its decision in this case, February 5, 1947, the court below filed its opinion in *Maloney Packing Company* v. *Reconstruction Finance Corporation.*[4] The *Maloney* case presented the situation of a husband's being the sole stockholder and president of the corporate slaughterer and his wife's being the sole stockholder of the corporate processor. Respondent had ruled such stockholding constituted affiliation between the two corporations. The court below set aside respondent's ruling, saying in part (at page 3 of the opinion):

> "To reach the conclusion that Maloney Packing Company (through its president and sole stockholder) indirectly controlled the stock of Benson Bros., it would have to be found as a fact that John E. Maloney controlled his wife, and thereby, through her stock ownership, controlled Benson Bros. Corp."

The facts of the present case call for the same reasoning and rule as was set forth in the *Maloney* case. It is the *fact* of ownership and control between the corporations which is decisive. The court below refused to indulge in a conclusive presumption in the *Maloney* case. There is an equally tenuous connection between the two corporations here involved. Since it was necessary to disregard their corporate entities in order to find that one controls the other, consistency required the same refusal in this case.

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[4] This opinion in action #334 Em. Ct. is not yet reported.

4. The decision of the court below is in conflict with the applicable decisions of the United States Circuit Courts.

The Circuit Courts have consistently applied the rules set forth in number two under this heading. The court of the eighth circuit summarized the applicable rules in *Commerce Trust Co.* v. *Woodbury*, 77 F. (2d) 478, 487, in these words:

> "Few questions of law are better settled than that a corporation is ordinarily a wholly separate entity from its stockholders, whether they be one or more. (citing cases). . . . Likewise, we think it must be conceded that neither ownership of all of the stock of one corporation by another, nor the identity of officers in one with officers in another, creates a merger of the two corporations into a single entity, or makes one either the principal or agent of the other. . . . (citing cases)—But notwithstanding such situation and such intimacy of relation, the corporation will be regarded as a legal entity, as a general rule, and the courts will ignore the fiction of corporate entity only with caution, and when the circumstances justify it, and when it is used as a subterfuge to defeat public convenience, justify wrong, or perpetrate a fraud."

Like rules have been announced and applied in the other circuits.

Nichols and Co. v. *Secretary of Agriculture*, 131 F. (2d) 651 (C. C. A. 1st);

N. L. R. B. v. *Timken Silent Automatic Co.*, 114 F. (2d) 449 (C. C. A. 2d);

Ohio Tank Car Co. v. *Keith Ry. Equipment Co.*, 148 F. (2d) 4, certiorari denied 326 U. S. 730, 66 S. Ct. 38 (C. C. A. 7th);

Continental Oil Co. v. *Jones*, 113 F. (2d) 557 (C. C. A. 10th);

Press Co. v. *N. L. R. B.*, 118 F. (2d) 937 (C. C. A. D. C.).

WHEREFORE it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the United States Emergency Court of Appeals should be granted.

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